

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS: 02-0279**  
**Gross Retail Tax**  
**For 1998, 1999, and 2000**

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**ISSUE**

**I. Prepaid Telephone Calling Cards – Gross Retail Tax.**

**Authority:** IC 6-2.5-2-1(a); IC 6-2.5-2-1(b); IC 6-2.5-4-1(b); IC 6-2.5-4-5; IC 6-2.5-4-6; IC 6-2.5-4-13; IC 6-8.1-3-3; IC 6-8.1-3-3(b); IC 6-8.1-5-1(b).

Taxpayer challenges the Department of Revenue's decision requiring taxpayer to pay gross retail (sales) tax on the amount of money it received from selling prepaid telephone calling cards.

**STATEMENT OF FACTS**

Taxpayer is in the business of selling prepaid telephone calling cards. Taxpayer sells the cards at wholesale to various retail outlets. Taxpayer also sells the cards directly to consumers by means of vending machines owned by the taxpayer.

The Department of Revenue (Department) conducted an audit of taxpayer's business records. The audit report concluded that taxpayer should have been collecting Indiana sales tax on the money received from its vending machines sales.

The taxpayer challenged the assessment of sales tax and submitted a protest to that effect. An administrative hearing was held, and this Letter of Findings follows.

**DISCUSSION**

**I. Prepaid Telephone Calling Cards – Gross Retail Tax.**

Taxpayer challenges the assessment of sales tax on the ground that it never received notice that it was required to collect sales tax from its vending machine customers. In addition, taxpayer obliquely suggests it is entitled to an exemption from collecting sales tax because it was acting as a "public utility" in selling the telephone cards.

Pursuant to IC 6-2.5-2-1(a), Indiana imposes a sales tax on all retail transactions made in this state. IC 6-2.5-4-1(b) defines a "retail transaction" as the acquisition of tangible personal property by a retail merchant for the purpose of resale and subsequent transfer of that property to

another for consideration. A retail transaction is defined as “selling at retail” and someone who engages in such a transaction is a “retail merchant.” “Selling at retail” is defined in IC 6-2.5-4-1(b) which states:

A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he: (1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration.

The sales tax statutes specifically exempt certain transactions. Elsewhere, the legislature has avoided any potential ambiguity by specifically designating certain vendors as “retail merchants.” IC 6-2.5-4-13 states:

A person is a retail merchant making a retail transaction when a person sells:

- (1) a prepaid telephone calling card at retail;
- (2) a prepaid telephone authorization number at retail;
- (3) the reauthorization of a prepaid telephone calling card; or
- (4) the reauthorization of a prepaid telephone number.

#### **A. Prospective Treatment.**

Taxpayer argues that it is entitled to prospective treatment of the audit’s determination that it should have been collecting sales tax on its vending machine sales. According to taxpayer, it is entitled to this prospective treatment because taxpayer “had received no notice of implementation of this tax or how to calculate, collect and/or remit the same” until the time that the Department conducted the audit investigation.

IC 6-2.5-4-13 was drafted by the state legislature as Ind. Pub. L. No. 8-1998 indicating that the law – as presently implemented – was placed into effect shortly before or during the time considered in the audit examination. Taxpayer is correct in its general assertion that, under IC 6-8.1-3-3, the Department is without authority to reinterpret a taxpayer’s tax liability without promulgating and publishing a regulation giving taxpayer notice of that reinterpretation. IC 6-8.1-3-3(b) states that “[n]o change in the department’s interpretation of a listed tax may take effect before the date the change is: (1) adopted in a rule under this section; or (2) published in the Indiana Register . . . .”

However, IC 6-8.1-3-3(b) provides the taxpayer no relief because the Department has done nothing which “reinterpret[s]” taxpayer’s sales tax liability. The legislature chose to implement IC 6-2.5-4-13 in the form, in the manner, and at the time it did. There is nothing which imposes a duty on either the legislature or the Department to inform Indiana residents – individually or collectively – of their responsibility under the state’s tax laws. To the contrary, the law imposes upon a businessperson the exclusive responsibility for collecting and remitting sales tax. “The

person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state.*” IC 6-2.5-2-1(b) (*Emphasis added*). The language of the statute could not be more direct; a customer *shall* pay sales tax, and the retail merchant *shall* collect that tax on behalf of the state. There is nothing in this language permitting business persons to avoid his or her responsibility on the ground that that they were unaware of the law for three years.

## **B. Utility Exemption.**

Taxpayer suggests that it is entitled to a sales tax exemption on the ground that it is a “public utility.” *See* IC 6-2.5-4-5; IC 6-2.5-4-6.

IC 6-8.1-5-1(b) in part provides that, “The notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.”

Taxpayer’s exemption argument is not well-taken because it has provided nothing which would indicate that it is a “public utility” or that a “public utility” in the business of selling prepaid telephone cards would be exempt from collecting and remitting sales tax. Under IC 6-8.1-5-1(b), taxpayer has not met its burden of demonstrating that it is a public utility or that its activities do not fall under the specific provisions of IC 6-2.5-4-13.

When taxpayer uses its vending machines to sell prepaid telephone cards, it is acting as a “retail merchant,” is engaged in “selling at retail,” and it should have been collecting sales tax on the vending machine transactions.

## **FINDING**

Taxpayer’s protest is respectfully denied.